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In The

Supreme Court of the United States

DAVID MEYER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND DESIGNATED OFFICE/BROKER OF TRIAD, INC., DOING BUSINESS AS TRIAD REALTORS,

Petitioners,

v.

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, AND BROOKS BAUER, INDIVIDUALLY AND ON BEHALF OF THE GENERAL PUBLIC,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF AMICUS CURIAE CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
I.	BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI..	1
II.	IDENTITY AND INTEREST OF *AMICUS CURIAE* AND INTRODUCTION	1
III.	THE NINTH CIRCUIT RULING, WHICH SWEEPS ASIDE WELL-ESTABLISHED CORPORATE LAW TO BENEFIT A PARTICULAR PLAINTIFF, DOES NOT PROMOTE THE PUBLIC INTEREST	4
IV.	DISREGARDING THE CORPORATE ENTITY SHOULD NOT BE PERMITTED WHERE A CORPORATE OWNER OR OFFICE DID NOT COMMIT, AUTHORIZE, OR HAVE KNOWLEDGE OF A WRONGFUL ACT NOR ESTABLISHED POLICIES THAT PERMITTED IT TO OCCUR.....	8
V.	THE NINTH CIRCUIT OPINION, WHICH FAILS TO GIVE DIRECTION TO CORPORATE OWNERS AND BROKER-OFFICERS, IN LIGHT OF THE REALITIES OF THE REAL ESTATE BROKERAGE BUSINESS, CREATES LIABILITY WITHOUT REGARD TO CAUSE OR CONSEQUENCE	12
VI.	CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES:

Holley v. Crank, 258 F.3d 1127 (9th Cir. 2001) 12, 13

STATUTES AND REGULATIONS:

California Business and Professions Code, section 10130 4

California Business and Professions Code, section 10131 4

California Business and Professions Code, section 10211 4

California Business and Professions Code, section 10158 4

California Business and Professions Code, section 10171.5 4

California Business and Professions Code, section 10132 5

California Business and Professions Code, section 10159.2 12

10 California Code of Regulations, section 2725 12

OTHER AUTHORITIES:

Telephone Interview with Thomas Hensley, Licensing Manager, California Department of Real Estate (December 11, 2001) 5

http://www.dre.ca.gov/stats01.htm 5

I.

BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the California Association of REALTORS® (hereinafter, "CAR") submits this brief in support of the petitioner, David Meyer, in his Petition for Writ of Certiorari.

II.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1] AND INTRODUCTION

CAR is a non-profit, voluntary, trade association incorporated in California whose members consist of local Boards and Associations of REALTORS®, and approximately 100,000 persons licensed as real estate brokers and salespersons by the State of California, as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. CAR is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate, the protection of private property rights, and the regulation of, and liability related to, licensed real estate activity.

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[1] The parties have consented to the filing of this brief. The letter of consent is on file with the Clerk of the U.S. Supreme Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

CAR actively supports fair housing objectives and maintains an Equal Opportunity-Cultural Diversity committee. The mission of the CAR Equal Opportunity-Cultural Diversity committee is to, in conjunction with local Boards of REALTORS®, design, promote and implement the Association's programs in the areas of minority outreach, fair housing, affirmative marketing, fair lending practices, and cultural awareness. The committee also monitors and evaluates legislative, legal and regulatory trends in issue areas related to equal access to shelter for all individuals.

While the California Association of REALTORS® actively promotes fair housing and abhors illegal discrimination, this case stands for a proposition that goes far beyond typical notions of vicarious responsibility. By creating a new test of holding a shareholder and broker-officer of a corporation liable, absent any facts giving rise to individual liability, the case uses a theory of closeness to the perpetrator and guilt by association to distort the federal fair housing law to assure recovery by the victim. Such notions of liability by wealth and association are antithetical to the tenets of the fair housing laws and do not support the underlying rationale of prevention or punishment of a culpable party and its real estate firm. The interpretation also creates a situation of requiring careful law abiding brokers to choose between following the licensing laws, including good prevention and training policies in supervising salespersons, and putting themselves personally at risk for acts over which there is no practical control.

Plaintiff alleges that an individual real estate salesperson (Crank) working for a real estate broker corporation (Triad, Inc.) unlawfully discriminated against the Holley plaintiffs in their efforts to buy a home by not presenting an offer to the developer and uttering racial epithets. The seller also brought suit alleging unlawful discrimination because the developer wanted to sell a new home to the couple. Crank, the salesperson, and Triad, Inc., the real estate brokerage firm, were sued. Attempting to maximize chances of monetary recovery, plaintiffs later expanded their suit to include defendant David Meyer, the sole owner and officer of Triad, Inc., in his individual capacity. The District Court dismissed the claim against Meyer concluding that Crank's discriminatory acts could be imputed to Triad but not to Meyer as an individual.

Plaintiffs appealed to the Ninth Circuit Court of Appeals which sidestepped well-established corporate law and used an expansionist construction to hold that the federal Fair Housing Act makes Meyer, solely due to his position as an owner and officer of the corporate brokerage firm, personally liable for fair housing violations committed by an employee of a corporation he owned. To do this, the Ninth Circuit Court of Appeals relied on an outdated regulation issued by the Department of Housing and Urban Development to broaden the scope of the fair housing law well beyond, if not in contradiction to, established law in other circuits. (See Petitioner's Writ, pages 9-17 for a discussion distinguishing the applicable federal cases.) In short, its holding, absent a thorough analysis of the traditional rules governing personal liability of corporate directors, officers or

shareholders, exposes those who own a corporation to individual liability absent personal involvement. Due to the common business structures used by real estate brokerage firms in California this ruling threatens to precipitate much upheaval and restructuring in the real estate industry.

III.

THE NINTH CIRCUIT RULING, WHICH SWEEPS ASIDE WELL-ESTABLISHED CORPORATE LAW TO BENEFIT A PARTICULAR PLAINTIFF, DOES NOT PROMOTE THE PUBLIC INTEREST.

Most real estate brokerage activities performed on behalf of others in California require a real estate broker's license from the California Department of Real Estate.[2] In California, either an individual or a corporation may hold a broker's license.[3] A corporation may hold a real estate brokerage license providing it designates a licensed broker as a real estate officer who can act on behalf of the corporation.[4] This person, the corporate broker-officer, must complete the same education requirements as any other broker.[5] However, the corporate entity itself actually conducts the brokerage activity and holds the separate corporate license. In contrast, only an

[2] California Business and Professions Code, section 10130.

[3] California Business and Professions Code, sections 10131, 10211, 10158.

[4] California Business and Professions Code, section 10211.

[5] California Business and Professions Code, section 10171.5.

individual may hold a salesperson's license.[6] A licensed real estate salesperson may not work independent of a broker,[7] but is only licensed to act through a broker, whether that broker holds a corporate or an individual broker's license.

Structuring a California real estate broker business as a corporation is a common phenomenon. In California alone there are more than 15,000 corporate real estate broker licensees and just over 17,000 individuals licensed as corporate broker-officers. Furthermore, 94,000 individuals licensed as real estate salespersons work for a corporate broker.[8] According to the California Department of Real Estate website,[9] as of October there were 107,258 real estate broker licensees and 205,921 real estate salesperson licensees. Thus, even though corporate licensees represent only 14% of all licensed brokers in California, a full 45% of all real estate salespersons work for these corporate brokers. Accordingly, the decision by the Ninth Circuit has the potential to not only affect the 17,000 corporate broker-officers but also nearly half of all real estate salespeople in California.

It is to be expected that if a salesperson unlawfully discriminates, the salesperson, the corporation and other persons who were specifically involved in the act would

[6] California Business and Professions Code, section 10132.

[7] California Business and Professions Code, section 10132.

[8] Telephone Interview with Thomas Hensley, Licensing Manager, California Department of Real Estate (December 11, 2001).

[9] http://www.dre.ca.gov/stats01.htm

be held liable under the fair housing laws. If the corporate owner or officer is guilty of direct violations, a proper interpretation of the law reaches that wrongdoer as well. As with any corporation, a real estate firm is ordinarily vicariously liable for the unlawful conduct of real estate salespersons in its employ, including the wrongful discriminatory acts alleged here. Nor would any corporation expect to be exempt from the scrutiny given to any corporation not respecting the requisite corporate formation, record keeping, and capital requirements. This is not the issue in this case. This case sweeps aside the well established methods of examining the corporation's validity and holds that, as a matter of law, the person who is the sole owner and corporate broker-officer of a real estate brokerage corporation is personally responsible for acts of the salespersons, even though there is no allegation of personal knowledge or involvement. Rather, the premise behind this liability is simply because it is possible that the broker *could* exercise supervision over the offender. The Ninth Circuit has deemed this tenuous connection sufficient under the fair housing laws to reach the innocent owner and officer directly and personally for acts for which he is unaware and did not assist in perpetrating. The consequences of the Ninth Circuit's holding only serve to punish innocents rather than further the purpose of the fair housing laws.

Since the corporate brokerage structure is common in California, individuals relying on the state's valid licensing structure will be presented with a dilemma: Not using the legitimate corporate structure at all and losing all the benefits thereto, or attempting to use the corporate structure and exposing the owner and corporate officer to

personal liability for all acts of those persons working for the corporation, whether or not the owner and officer had knowledge of the illegal act, permitted it to occur or, even worse, took reasonable steps to reduce the risk that improper conduct would take place. Should the Ninth Circuit decision stand, a corporate officer that becomes a broker-officer for purpose of fulfilling the licensing laws that require oversight to be exercised by an individual exposes that person to personal liability by virtue of his position as corporate officer for all the acts of the salespersons with respect to the fair housing laws. In a larger firm, this could be hundreds, and in some cases thousands, of salespersons.

The Ninth Circuit has interpreted the policy of the fair housing law to state that an innocent person should be held responsible for violations of the fair housing law solely due to that person's ownership in a corporation or that person's position as a corporate broker-officer licensed under state licensing law. The apparent purpose of ruling is nothing more than to assure *recovery* by a victim of discrimination. Surely merely augmenting the recovery pool, as opposed to holding the actual and corporate wrongdoer financially and legally responsible for violations of the fair housing laws, cannot represent the true purpose of the legislation.

The Ninth Circuit ruling forces corporate owners and officers to reconsider their business structure. The impact of the ruling, in California alone, can reach thousands of real estate broker licensees, tens of thousands of real estate salesperson licensees and hundreds of thousands of individuals they represent. Those most closely associated with their own business may decide it is no longer

prudent to be the sole owner or to act as a broker-officer for their own firm. Others will be appointed or hired in their place. To protect themselves from the potential legal liability stemming from the Opinion, corporate owners will likely consider an organizational structure that isolates the owner and officer from the business. Some small organizations, similar to the one in this case, may even decide that the strict liability risk attendant to having a number of salespersons in the office is too great and will go out of business or reduce their staff. The decision thus has the potential of not only harming innocent officers but also innocent, responsible salespersons and their clients who have come to rely upon them for needed and valuable real estate services. Rather than increasing responsibility, the decision will have the affect of diluting accountability and even the availability of real estate services.

IV.

DISREGARDING THE CORPORATE ENTITY SHOULD NOT BE PERMITTED WHERE A CORPORATE OWNER OR OFFICE DID NOT COMMIT, AUTHORIZE, OR HAVE KNOWLEDGE OF A WRONGFUL ACT NOR ESTABLISHED POLICIES THAT PERMITTED IT TO OCCUR.

A corporation is a viable and valuable business entity that is recognized and sanctioned by the State of California as a valid business structure in the real estate brokerage business. Public policy dictates that such a structure be permitted to continue in form and substance in the absence of an overriding wrong, such as when the owner

or officer of the company commits or authorizes misconduct or established policies that allow such misconduct to flourish.

The corporate structure is synonymous with the growth, wealth and well being of the American people. Trading in corporations has practically become the American pastime as the New York Stock Exchange (NYSE), American Stock Exchange (AMEX) and National Association of Securities Dealers (NASDAQ) demonstrate. The structure allows businesses to be formed, grow and prosper. Through the corporate structure, small organizations can attract not only monetary capital but also qualified individuals (personnel capital) necessary to effectively compete and succeed in the open marketplace.

The corporate structure does this by reducing the risk associated with business. Rather than risk being unlimited, and thus threatening and intimidating to large and small investors alike, the corporate entity makes the risk limited and thus more inviting. The investor knows that the maximum loss exposure is the money placed into the business venture (and lost profits associated therewith). The officer can take comfort in the knowledge that while one's job, income and perhaps immediate livelihood can be lost due to corporate liability, one's own home, savings and other assets are not subject to personal attack and attachment due to the same corporate liability.

The consumers (be they individuals, businesses or corporations themselves) of corporations' goods or services also, consciously or unconsciously, take advantage of a risk reduction analysis of their own. By dealing with

a corporate entity, the consumer has the benefit of looking to a corporate entity for performance or wrongdoing. The corporation does not have a definite life span, like that of an individual that can be interrupted at any time. The corporation has the advantage of being able to combine assets invested by many rather than the possibly limited assets of an individual or few partners. The corporation may have the advantage of the ability to raise additional monetary capital that an individual does not. The corporate entity has a vested interest in its continued operation whereas declaring forfeiture and starting anew may better serve an individual.

The individual wrongdoer could be made to pay for the unlawful conduct of the individual. The innocent corporation could be made to pay for the unlawful conduct of the individual. If the losses to the corporation are great enough, the owners and investors of the corporation will also, indirectly, pay for the unlawful conduct of the individual. The owners and investors could lose their investment. The owners and investors could lose their income stream generated by the investment. The owners and investors could lose their opportunity to put their investment dollars to more productive use by investing in other businesses or ventures. If the losses to the corporation are great enough, the officers of the corporation will also, indirectly, pay for the unlawful conduct of the individual. The officers could lose their jobs and their reputations, and even their ability to become reemployed in the same line of business elsewhere. The personal toll on the officers could be great indeed.

In this case, none of the traditional basis to disregard the corporate entity (to pierce the corporate veil, so to

speak) and extend liability to Meyer, as an individual, who is an owner and officer of Triad, Inc. have been discussed or even identified by the Court of Appeal. There is no evidence that the corporate entity was established to perpetuate a fraud, circumvent a statute, evade contractual obligations, or accomplish a wrongful act. There is no evidence that the corporation is wholly inadequately capitalized to engage in the real estate business. There is no evidence, through either words or actions that the separate identities of Triad, Inc., the corporation, and Meyer, the individual, have ceased to exist.

The opinion of the Ninth Circuit that blatantly disregards a lawful corporate entity and punishes an innocent owner and officer of the corporation in order to reward a particular plaintiff in a particular case has implications beyond the parties to this Petition. The societal advantages of a corporate structure to owners, investors, officers and consumers are reduced substantially. The risks associated with starting and growing a business that employs one, a few or thousands of individuals, that pays taxes, and that serves a consumer need are increased dramatically. Accountability is decreased and service to the public is thereby effectively limited without an identifiable societal gain or a serious discussion balancing the competing interests.

V.

THE NINTH CIRCUIT OPINION, WHICH FAILS TO GIVE DIRECTION TO CORPORATE OWNERS AND BROKER-OFFICERS, IN LIGHT OF THE REALITIES OF THE REAL ESTATE BROKERAGE BUSINESS, CREATES LIABILITY WITHOUT REGARD TO CAUSE OR CONSEQUENCE.

As stated previously, real estate brokers use many legal business structures such as sole proprietorships, partnerships, and corporations. Some brokers perform all licensed activity through a single individual holding a real estate brokers license. Other brokers perform licensed activity using the services of hundreds or thousands of individuals each holding a real estate salesperson or broker license. Of course there are many variations in between. Many real estate brokerage firms organize as a corporation, whether with sole ownership or with multiple owners. Many REALTORS® have a legal business structure similar to the defendant Meyer. When an individual wholly owns a corporate real estate firm, the same individual is often also the broker holding the corporate broker-officer's license. In California, the broker-officer has a duty to exercise *reasonable* supervision over the activities of his or her salespersons.[10]

The Ninth Circuit recognized this obligation and held, "If Meyer breached that duty to supervise then he should be held accountable for such an omission even absent direct involvement or authorization of Crank's alleged discriminatory conduct." *Holley v. Crank*, 258 F.3d

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[10] California Business and Professions Code section 10159.2, 10 California Code of Regulations, section 2725.

1127, 1135 (9th Cir. 2001). The opinion indicates that Petitioner testified that his responsibilities included making sure that people were treated lawfully (*Holley v. Crank, supra,* at page 1135) but there is an absence of any discussion of what supervisory activity would be sufficient or insufficient to avoid personal liability for activities of the broker-officer's salespersons. Rather, without examining what steps were actually taken by Petitioner or what steps would constitute reasonable supervision in satisfaction of the state licensing requirement, the Ninth Circuit opinion focuses instead on HUD's regulatory history of allowing complaints against individuals who have the *right* to direct or control the conduct of another. *Holley v. Crank, supra,* at 1135.

To better comprehend what obligations satisfy the duty of a broker-officer to reasonably supervise a real estate office, one needs to first understand that a real estate brokerage business is a uniquely personal business. With the advent of technology, it is now possible for buyers and sellers and brokers and agents and lenders and appraisers and inspectors who have never met before, and may never meet again, to come together to transact business. There are computers and software and forms to assist in the transaction. But in the beginning and in the end, real estate is a personal services business. As a result, whether a corporate broker employs one salesperson or one thousand, it is impossible for an owner or officer to be at all places and at all times.

A closer look at the industry will help explain its uniquely personal nature. Brokers, through their real estate agents, meet with buyers and sellers, sometimes in

person, sometimes over the phone and establish relationships. Only through these relationships is a real estate transaction begun, and often kept together, and sometimes undone. Real estate people do not just work in an office from 9:00 a.m. to 5:00 p.m. Real estate people work in the office, out of their homes, out of their client's homes, from their cars, at the golf course, over breakfast, lunch and dinner, with their office phone, with their home phone, with their cell phone, from a desk, from the hood of their car, during the week, during the weekend, morning, noon and night. Wherever people (clients, affiliates, etc.) are and at whatever time, a real estate agent has to be available. Given the nature of the real estate business, an owner or officer of a real estate corporation cannot find a way to minimize the risk of liability exposure under the rule pronounced by the Ninth Circuit.

The Ninth Circuit opinion assumes that a corporate owner, officer or broker-officer has liability because of general supervisory responsibilities. The Ninth Circuit does not identify any policies or procedures that the broker-officer did or could have initiated that would have the effect of cutting off personal liability of the broker-officer for the unlawful discriminatory conduct of an individual salesperson working for the corporation. In essence, the Ninth Circuit opinion requires the individual owner, officer or broker-officer to be omnipresent and if that person is not at all times present (which, as previously discussed, is impossible in the real estate business) to prevent an illegal activity then liability automatically flows to that person individually in the same manner as it does to the corporate entity.

It would be a fair construction of the Fair Housing Act to examine supervisory activities in furtherance of prevention of unlawful activities such as policies designed to prevent unlawful discrimination and perhaps even training efforts. Failure to adequately supervise as a licensed broker by dire neglect of the corporate activities or failure to act once being put on notice of a discriminatory act are manageable and acceptable duties and required as part of many licensing laws. However, the Ninth Circuit opinion makes no allowance for any of the usual supervisory activities that an owner or officer could do, on behalf of a corporation, to reduce the risk of unlawful discrimination. The Ninth Circuit opinion makes no allowance for whether the corporation had training or supervision in place. No allowance for whether there was fair housing educational requirements that needed to be met, either as a condition of employment or holding a real estate license. No allowance for whether policy statements, in writing or otherwise, are established by the corporate entity. In short, there is no allowance for the type of things, theoretically, that an owner or officer can insist upon in a real estate broker corporation. The Ninth Circuit opinion leads one to conclude that all that has to happen for vicarious liability to attach to an individual owner or officer, in addition to the corporation, is for the broker-officer to have the right to control conduct. In such a world, personal liability would attach any time an errant or disenfranchised salesperson says the wrong thing, no matter what efforts the owner, officers or broker-officer took to prevent such an unfortunate event from occurring. Since a broker's physical presence in every step of a potential transaction is an

impossibility, absolute prevention cannot occur. Reasonable steps at prevention can occur. Yet under the Ninth Circuit's ruling, the corporate broker-officer is personally at risk for an activity not within his control and presumably is at risk even if he *had* done everything in his control.

The broker-officer is treated as the corporation itself. Having a corporation take these risks because it is in the business of real estate brokerage is one thing, extending the corporate liability doctrine to innocent owners, officers or broker-officers is another altogether. No other Circuits have gone so far in interpreting the fair housing laws, nor should the Ninth Circuit be allowed to do so.

VI.

CONCLUSION

CAR believes that the Ninth Circuit's holding that innocent owners and officers of real estate corporations may be held personally liable for an employee's violation of the Fair Housing Act is inconsistent with well established bodies of law and establishes poor public policy. Accepted foundations of corporate law and structure have been summarily displaced as they apply to real estate licensees. The policy behind those corporate principles is well grounded in historic application of corporate business structures and in holding culpable people responsible in a predictable way.

Certainly CAR does not approve of nor sanction unlawful discrimination. Yet, remedies are available that reach the wrongdoer as well as the company for which

that person works. To expand it beyond these high standards of accountability and hold admittedly innocent parties liable, sweeping aside years of established corporate law would multiply injustice rather than ameliorate it.

For all of the reasons stated above, *amicus curiae*, CAR urges this Supreme Court to accept the Petition for Writ of Certiorari.

Respectfully submitted,

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